IN THE SUPREME COURT OF THE UNITED STATES
DEATH PENALTY CASE
EXECUTION SCHEDULED: 12:01 A.M., CDT, OCTOBER 29, 2014

MARK A. CHRISTESON, Petitioner,	:	Nos. 14-6873
	:	14A445
v.	:	
	:	
DONALD ROPER, WARDEN, Respondent	:	

PETITIONER'S SUPPLEMENTAL BRIEF REGARDING MR. CHRISTESON'S AUTHORIZATION OF COUNSEL MS. MERRIGAN AND MR. PERKOVICH TO MOVE FOR SUBSTITUTION OF COUNSEL

1. By An August 7, 2014 Letter, Mr. Christeson Retained Merrigan and Perkovich

Mr. Christeson first retained undersigned counsel Merrigan and Perkovich by a retention agreement letter dated August 7, 2014 (Retention Agreement), counter-signed by Mr. Christeson and returned through the prison mail on August 12, 2014, and carried out pursuant to Missouri Professional Conduct Rule 4-1.2(c), which provides: "A lawyer may limit the scope of representation if the client gives informed consent in a writing signed by the client to the essential terms of the representation and the lawyer's limited role." Missouri Rule 4-1.2(c).

The existence of this Retention Agreement was identified in supplemental briefing before the Eighth Circuit. Petitioner therein noted that the Retention Agreement

> is subject to attorney/client privilege and confidentiality. However, for the purposes of clarifying the present question of standing, Appellant submits that the August 7, 2014 letter specifies that undersigned counsel would represent Mr. Christeson in his appeal of the Order in question and only in that appeal, detailing this scope of appellate representation. By August 12, 2014, Mr. Christeson signed and returned to undersigned counsel the retention letter for this limited representation.

App. 190a.

2. Mr. Christeson's Representation Continued With The Renewed Substitution Motion Resulting In The Eighth Circuit Judgment Before This Court

Upon the Eighth Circuit's dismissal on October 15, 2014 of the appeal from the district court's July 10, 2014 order, Ms. Merrigan ultimately filed her Renewed Amended Entry of Appearance in the Western District of Missouri on October 21, 2014, wherein she stated:

> Counsel noticed her appearance on Petitioner's behalf on August 5, 2014, (Doc. 81), for the limited purpose of appealing from the July 10, 2014 order. Ms. Merrigan continues her *pro bono* representation concerning the subject and substance of that dispute, *viz.* the conflict of interest of the Court-appointed attorneys against Mr. Christeson and the requirement of this Court to ensure substitution by conflict-free counsel. This representation continues to be governed by Mo. Prof'l Conduct Rule 4-1.2(c). Additionally, Petitioner qualifies for such limited representation under Prof'l Conduct Rule 4-1.2(d)(2) because counsel is representing him in her institutional capacity with the Saint Louis University School of Law. Ms. Merrigan filed her Amended Entry of Appearance. (Doc. 95).

App. 341a. The language in this Renewed Amended Entry of Appearance was included as fn. 2 in the Renewed Motion By *Pro Bono* Counsel For Substitution Of 18 U.S.C. §3599 Appointed Counsel (App. 344a), which the district court denied and the court of appeals' judgment before this Court affirmed.

3. Written Request and Agreement from Mark Christeson to Counsel for Their Representation

As set forth above, undersigned counsel have previously withheld the improper disclosure of client correspondence in recognition of attorney/client privilege and confidentiality concerns, as expressed in briefing in the lower courts. In response to Justice Alito's ordered briefing, Ms. Merrigan reached Mr. Christeson by telephone and

received his consent to release to this Court relevant correspondence. A copy of Mr. Christeson's Retention Agreement with Ms. Merrigan and Mr. Perkovich and other correspondence from him is appended hereto, pursuant to Rule 32.3 of this Court. The following are relevant excerpts.

On May 14, 2014, Mr. Christeson wrote, *inter alia*:

> I know that I've already told you and Joe how thankful I am for your assistance, but I thank you both again. I honestly had started to lose hope. However, after speaking with the both of you that has actually changed. And I really hope the both of you get appointed to my case.

On May 15, 2014, Mr. Christeson signed and notarized a "Consent to Representation", wherein he stated, *inter alia*:

> I, Mark Christeson, understand that attorneys Joseph Perkovich and Jennifer Merrigan are filing a motion for appointment in the district court in my case, in order first to litigate the dismissal of my habeas petition as untimely. I consent to their representation. I also understand that they are not my lawyers, until the court appoints them.

On June 18, 2014, a fellow inmate typed for Mr. Christeson a letter to Ms. Merrigan expressing, *inter alia*:

> My attorneys (Butts and Horwitz) and I, also spoke of attorneys Joe Perkovich and Jennifer Merrigan. Attorneys Horowitz [sic] and Butts expressed their opinions that it would not be in my best interest if attorneys Perkovich and Merrigan represented me due to the fact that they were out of State attorneys. Attorneys Horowitz and Butts are afraid I will gets "lost in the shuffle of out of State lawyers." Attorneys Horowitz and Butts stated that attorneys Perkovich and Merrigan may not want to represent me pro-bono however, attorneys Perkovich and Merrigan have already agreed to do so. Attorneys Horowitz and Butts nonetheless expressed their opinion again that attorneys Perkovich and Merrigan did not have my best interest in mind and that I would be better off with attorneys from Missouri. I respectfully disagree. It was attorneys Horowitz and Butts that contacted attorneys Perkovich and Merrigan requesting their assistance with my case. I personally feel that attorneys Joe Perkovich and Jennifer Merrigan should be allowed to represent me. I truly believe that despite attorneys Horowitz and Butts's opinion, that attorneys Perkovich and Merrigan do have my best interest in mind and

> more so then Horowitz or Butts. In the short time that I have been in contact with attorneys Perkovich and Merrigan, they have gone out of their way to come and visit with me twice to discuss my case. They have been in constant contact with me by phone and through letters letting me know exactly what is going on and what they are doing on my behalf. In my opinion, it is attorneys Horowitz and Butts that do not have my best interest in mind. If they did they would have filed my Federal Habeas Corpus on time and I wouldn't be having to fight to get the court to allow me to do it now out of time. I truly believe that attorneys Perkovich and Merrigan have shown more passion and concern regarding my case than any attorneys thus fare and therefore, I feel it would be in my best interest if they were allowed to represent me.

As the foregoing reflects, Mr. Christeson's view about undersigned counsel representing him has been clear for months. Further, the assistance of inmate law clerks also reflects Mr. Christeson's struggle to replace his conflicted appointed counsel.

4. Contemporaneous Fellow Inmate Observations

In addition to the correspondence with Mr. Christeson, undersigned counsel received declarations from three fellow inmates that observed Mr. Christeson's position concerning representation by Mr. Perkovich and Ms. Merrigan.

Former cellmate Jonathan French stated:

> On April 4, 2014 I went to the Hole. . When I got back to PC, Mark told me things were being done on his case by new lawyers who had come to meet him while I was gone. Mark was very glad about this because he almost never even heard from his old court-appointed lawyers, Phil and Eric, and felt that they had never done anything to help him." App. 234a. French further stated: "Mark was even more positive than ever because he had the new lawyers digging into his case and showing him that they were doing so by talking to him often, sending documents they were filing, and also visiting him.

App. 235a.

Protective Custody law clerk William Harrison: "I only learned that Mark's lawyers had filed his petition untimely several months later, when he came back to me for

help. Mark said that his lawyers had not done anything for him and that new lawyers were trying to help him." App. 237a.

Prison Law Clerk, Ed Burgdorf stated:

> Mark was under the belief that his appeals were ongoing. It wasn't until about 4 months ago that Mark shared some of his letters with me and I realized the state of Mark's case. Mark did not realize his appeals were over. Only when Mark received he motions requesting different counsel, did it finally dawn on me what was happening with his case.

App. 229a.

CONCLUSION

As can be seen from the foregoing, Mr. Christeson had repeatedly urged Ms. Merrigan and Mr. Perkovich to replace his appointed lawyers before undersigned counsel ultimately were able to appear in the lower courts on his behalf and, now, before this Court.

For these further reasons set forth in this ordered briefing, this Court should grant Mr. Christeson a stay of execution and a writ of certiorari.

Respectfully submitted,
/s/Jennifer A. Merrigan

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Counsel For Petitioner, Mark A. Christeson
October 28, 2014

CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the foregoing was forwarded via electronic mail and U.S. First Class Mail, postage prepaid, to the following address on this the 28th day of October, 2014:

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/s/Jennifer A. Merrigan
Jennifer A. Merrigan

Counsel for Petitioner